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November 9, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 26, 2009

Case Number: TSO-0778

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (the Individual) to obtain an access authorization.^{1/} The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization.^{2/} After reviewing the evidence before me, I find that the Individual should not be granted access authorization.

I. Background

This administrative review proceeding began when a Department of Energy (DOE) Local Security Office (LSO) denied the Individual access authorization based upon derogatory information in its possession that created substantial doubt pertaining to his eligibility. In accordance with 10 C.F.R. § 710.21, the LSO subsequently issued a Notification Letter that included a statement of the derogatory information causing the security concern. The

^{1/} Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

^{2/} Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

Notification Letter cited security concerns related to § 710.8(f), (k), and (l) (Criteria F, K, and L).

The derogatory information supporting the Criterion F^{3/} security concern states that the Individual admitted during a December 30, 2008, Personnel Security Interview (PSI) that he lied on the Questionnaire for National Security Positions (QNSP) regarding his illegal drug use. Notification Letter dated May 13, 2009, Enclosure 1 at 1.

The derogatory information supporting the Criterion K^{4/} security concern states that the Individual admitted at that same PSI that he used marijuana as recently as November 2007. Notification Letter, Enclosure 1 at 1. Further, the Notification Letter stated that the Individual admitted that he used marijuana one to two times per year between 1999 and 2004 and one time per year between 2004 and 2007. Notification Letter, Enclosure 1 at 1. Finally, the Notification Letter stated that the Individual admitted to using hallucinogenic mushrooms one time in 2001 and one time in 2003. Notification Letter, Enclosure 1 at 1.

The derogatory information supporting the Criterion L^{5/} security concern states that the Individual admitted that his wife continued to use marijuana, and therefore, marijuana was present in his home. Notification Letter, Enclosure 1 at 2. In addition, in December 2008, the Individual allowed his cousin to smoke marijuana in his automobile. Notification Letter, Enclosure 1 at 2. Also, the Notification Letter stated that the Individual did not

^{3/} Criterion F refers to information indicating that an individual “deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization.” 10 C.F.R. § 710.8(f).

^{4/} Criterion K refers to information indicating that an individual has “trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C. F. R. § 710.8(k).

^{5/} Criterion L refers to information indicating that an individual has “engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. §710.8(l).

have a problem with his wife and cousin using marijuana. Finally, the Notification Letter noted that the Individual indicated that “he did not like to give concrete answers” regarding his future intentions about illegal drug use. Notification Letter, Enclosure 1 at 2.

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. Upon receipt of the Notification Letter, the Individual requested a hearing, and that request was forwarded to the Office of Hearings and Appeals (OHA). The OHA Director appointed me the Hearing Officer in this matter, and I conducted a hearing in this case in accordance with 10 C.F.R. § 710.25(e) and (g).

At the hearing, the Individual represented himself. He testified on his own behalf and presented the testimony of his wife, one co-worker, and two friends. The DOE Counsel presented no witnesses, but entered five exhibits into the record.

II. The Hearing Testimony

A. The Individual

The Individual testified that he has been working for DOE since November 2007. Hearing Transcript (Tr.) at 7. Regarding his illegal drug use, he testified that he used mushrooms one time in 2001 and one time in 2003. Tr. at 31. The Individual testified that he used marijuana one to two times a month from 1999 to 2007.^{6/} Tr. at 32. He gave up marijuana in May 2007. Tr. at 32. His prior attitude was that getting arrested for using marijuana was like getting a speeding ticket. Tr. at 33. He believed the punishment for being arrested for using marijuana was equivalent to a “slap on the wrist.” Tr. at 33.

The Individual testified that he understands DOE’s concerns with people who use drugs and he will never use illegal drugs again. Tr. at 33. He also testified that he will not tolerate anyone using illegal drugs around him. Tr. at 35. No one he associates with uses drugs. Tr. at 37. His wife stopped using marijuana two to three months prior to the hearing. Tr. at 33. The Individual testified that she stopped smoking marijuana for herself. Tr. at 35.

When the Individual was asked why he falsified his drug usage on the QNSP, he testified that he was afraid of getting arrested. Tr. at 12, 30. He also stated that he did not think the question was important. Tr. at 12. He testified that he did not read the question carefully and he thought the question asked if he had ever been convicted for his drug use. Tr. at

^{6/} This testimony differs from his statements in the PSI in which he said he used marijuana one or two times a year between 1999 and 2004 and one time a year between 2004 and 2007. DOE Ex. 3 at 63-67, 73-75.

13. In addition, he stated that he thought if he said “no,” the process would be quicker. Tr. at 13, 30. He testified, “The least amount of information I divulged, the faster it would go through.” Tr. at 15. He testified that he does not like people that lie. Tr. at 95. He stated that he no longer has any contact with his mother-in-law because she is a chronic liar. Tr. at 95.

B. The Individual’s Wife

The Individual’s wife testified that they have been married for five and a half years. Tr. at 45. She testified that she has known the Individual for seven years. Tr. at 45. He does not use illegal drugs anymore. Tr. at 47. He stopped because college life was over. Tr. at 47.

The wife testified that she “stopped using marijuana a few months ago.” Tr. at 51. She used to smoke marijuana in the evenings. Tr. at 51. She has removed all drug paraphernalia from their residence. Tr. at 51. The Individual was not around when she used marijuana. Tr. at 50-51. She is a student now. Tr. at 51.

The wife testified that the Individual does not keep secrets from her. Tr. at 48. His wife testified that he is honest with her, but he does not talk to her about his work. Tr. at 48, 49. He is very blunt with people, even if it will hurt their feelings. Tr. at 49. She testified that she believes he falsified his answer on the QNSP because he did not think the question was important. Tr. at 50. The wife testified that the Individual does not tolerate people who lie. Tr. at 95. They no longer speak to her mother, because her mother lies. Tr. at 95.

C. The Individual’s Friends

The first friend testified that they met two and a half years ago through a mutual acquaintance. Tr. at 57. They see each other two to three times a week. Tr. at 60. The Individual has not used drugs since they met, even though he has been asked if he wished to purchase illegal drugs. Tr. at 63. The Individual has never expressed a desire to use illegal drugs. Tr. at 63. The first friend testified that he never saw the wife use any illegal drugs. Tr. at 65-66. The friend testified that he can always count on the Individual to do as he says he is going to do. Tr. at 59. He never tells lies. Tr. at 60. The first friend testified that he believes that the Individual did not understand how serious the QNSP was. Tr. at 62.

The second friend testified that they have been friends for five to six years. Tr. at 70. He sees the Individual weekly. Tr. at 76. He trusts the Individual with his secrets. Tr. at 71. He testified that the Individual has not used illegal drugs since he started with the DOE. Tr. at 73. He stated that the Individual does not associate with the same friends with whom he used drugs in the past. Tr. at 73. No one uses drugs around the Individual. Tr. at 74. The second friend testified that he has not seen the Individual’s wife use illegal drugs in more than six months. Tr. at 77.

D. The Individual's Co-Worker

The Individual's co-worker testified that they have worked together for two years. Tr. at 80. He does not believe that the Individual fully understood the seriousness of the process. He believes the Individual is very trustworthy. Tr. at 82-83. The co-worker does not believe the Individual would try to hide anything. Tr. at 85. They have socialized a couple of times. Tr. at 87. He has not seen any drug use by the Individual. Tr. at 88. The co-worker testified that "I know that he selectively does not want to hang out with people doing drugs." Tr. at 88. He testified that he "knows" the Individual's wife was not using illegal drugs as of the time of the hearing. Tr. at 88.

III. *Standard of Review*

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of proceeding, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates that "security-clearance determinations should err, if they must, on the side of denials.") *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate, or mitigate the allegations. *Personnel Security Hearing*, Case No. VSO-0005, *aff'd*, (1995). See 10 C.F.R. § 710.7(c). In the end, like all OHA Hearing Officers, I must exercise my common sense judgment in determining whether an individual's access authorization should be restored or granted after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his falsification and drug use.

IV. *Findings and Conclusions*

A. Criterion F

The White House issued the Adjudicative Guidelines on December 29, 2005, and made them applicable to the entire federal government. The Adjudicative Guidelines list causes for concern and possible mitigation of those concerns in the process of granting and retaining an access authorization. The corollary to Criterion F of the Part 710 regulations

is Guideline E of the Adjudicative Guidelines. In pertinent part, Guideline E states the following conditions which could raise a security concern, "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness." As support for this Criterion, the LSO relied upon the Individual's admission during a December 30, 2008, PSI that he falsified answers on the QNSP regarding his illegal drug use. DOE Ex. 1, Enclosure 1 at 1.

In evaluating a Criterion F case involving falsifications, based upon conditions outlined in the Adjudicative Guidelines and our case law, I must consider factors such as whether the individual came forward voluntarily to renounce his falsifications, the length of time the falsehood was maintained compared to the length of time the individual has been honest, whether there is a pattern of falsifications, the amount of time that has transpired since the individual's admission, and whether the individual was advised regarding the security clearance process. *See Personnel Security Hearing*, Case No. TSO-0668, February 3, 2009, and cases cited therein. *See also* Adjudicative Guidelines, Guideline E ¶ 17(a)-(d).

The Individual testified that he did not think the QNSP was important. He also claimed that he did not purposely hide his drug use, and he misunderstood the QNSP question to be if he had ever been convicted of drug use. Conversely, he stated that he was afraid that he would be arrested for admitting he used an illegal substance and that he thought the process would be accelerated if he divulged "the least amount of information."

I find that the Individual deliberately falsified relevant and material information on his QNSP. He falsified information when he denied that he had ever used an illegal substance. At the hearing, he admitted that he falsified the QNSP. His explanations of why he falsified the information are weak and contradictory. Further, he admitted at the hearing that he lied during the PSI when he stated that he used marijuana one to two times a year. He stated at the hearing that he actually used marijuana one to two times a month. Tr. at 32.

Further weighing against mitigation, I find that the Individual did not come forward voluntarily but rather told the truth about his illegal drug use only when confronted at the PSI. Also, he maintained his lie for nine months, from July 2008 to December 2008. At the PSI, he minimized his use and was not totally honest with DOE when he gave inconsistent and contradictory responses regarding his reasons for falsifying his drug use on the QNSP. Finally, the Individual's lies on the QNSP and again at the PSI shows a pattern of willingness to falsify information to the DOE. I find nothing significant in the record weighing in favor of mitigation. Accordingly, I find that the Individual has failed to mitigate the Criterion F security concerns.

B. Criterion K

The corollary to Criterion K of the Part 710 regulations is Guideline H of the Adjudicative Guidelines. In pertinent part, Guideline H states that illegal drug use could raise a security concern. The LSO raised a Criterion K security concern in this case based upon the Individual's use of marijuana between 1999 and 2007.

In evaluating a Criterion K case involving illegal drug use, based upon conditions outlined in the Adjudicative Guidelines and our case law, I must consider factors such as the length of time since the last reported drug usage, the frequency of the drug usage, whether the individual has disassociated from drug-using associates, and whether the individual has changed the environment where he used drugs. *See Personnel Security Hearing*, Case No. TSO-0764 (2009). *See also* Adjudicative Guidelines, Guideline E ¶ 26(a), (b).

When confronted at the PSI by reports of his illegal drug use, the Individual admitted that he used marijuana and mushrooms. However, his hearing testimony regarding his use of marijuana contradicts his statements during the PSI and the derogatory information on which the Notification Letter is based. At the PSI, he originally stated that he used marijuana one to two times a year between 1999 and 2007. DOE Ex. 3 at 63-67, 73-75. At the hearing, he stated that he used marijuana one to two times a month between 1999 and 2007. Tr. at 32. He testified that he last used marijuana in May 2007. His wife confirmed that testimony. All three of his other witnesses testified that they have not seen him using marijuana since he started working at DOE. I am not persuaded, however, by the Individual's testimony or that of his witnesses. The Individual told the interviewer at the PSI that he used marijuana one to two times a year. At the hearing, he testified that he used marijuana one to two times a month. One witness testified that he has never seen the Individual's wife use marijuana during a time when she admitted she was using marijuana. Yet, that witness also testified that he has not seen the Individual smoking marijuana during the last two years. Given this weak and wavering testimony, I cannot find that the Individual has given believable testimony about his last use of marijuana or that his witnesses have corroborated the date of his last marijuana usage.

Further, I am not persuaded that the Individual is so far removed from his marijuana use that it will not recur. As I indicated above, he has not corroborated the date of his last use. His drug usage was frequent during the time he was using marijuana. At the hearing, he testified that he used marijuana one to two times a month. Further, he has not disassociated himself from all drug-using associates. Until three months prior to the hearing, his wife was still admittedly using marijuana. The Individual stated that he continues to see his cousin who is still using marijuana and, as recently as December 2008, his cousin smoked marijuana in the Individual's car. Weighing all the factors together, I find that the Individual has not mitigated the Criterion K security concern regarding his illegal drug use.

C. Criterion L

The Notification Letter raised a Criterion L security concern in this case based upon the Individual's association with his wife and cousin, both of whom continued to use illegal drugs.^{7/} Criterion L includes circumstances that tend to show that an individual is not "honest, reliable or trustworthy" or is subject to "pressure or coercion."

As to the LSO's claim that the Individual is associating with people who continue to use illegal drugs, the Adjudicative Guidelines state that association with a person who is involved in criminal activity could raise a security concern. Adjudicative Guidelines ¶ 16(g). To mitigate such a security concern, the individual could show that the association with such a person has ceased. Adjudicative Guidelines ¶ 17(g). In this case, the LSO raised the Criterion L concern because the Individual's wife was still using marijuana as recently as the spring of 2008. In addition, the Individual admitted that he allowed his cousin to smoke marijuana in his car in December 2008.

I found the wife's testimony regarding her cessation of marijuana usage weak. The Individual testified that his wife stopped using marijuana two to three months prior to the hearing. She testified that she stopped using marijuana a few months prior to the hearing. This self-serving testimony is too broad to be convincing in this case. Further, I am troubled that she claims to have stopped only two to three months prior to the hearing. Although she testified that she stopped smoking marijuana because she is a student now and it is something she no longer wants to do, I am not persuaded that her claimed cessation is not in part motivated by the Individual's current attempt to be granted a security clearance. Moreover, the other witnesses gave no solid testimony that the Individual's wife has stopped using marijuana. The first friend testified that he never saw the wife use marijuana. The second friend testified that he had not seen the wife use illegal drugs in more than six months. The co-worker testified that the wife was not using illegal drugs as of the date of the hearing. The co-worker's testimony was not convincing to me

^{7/} The LSO also raised a security concern to the effect that the Individual could not confirm that he would never use marijuana again in the future. While the Notification Letter states that the Individual could not positively confirm that he would not use marijuana in the future, I disagree. This concern is not borne out by his actual statements at the PSI. At the PSI, the Individual stated, "It's so hard to give concrete answers on future events, but . . . I'm never gonna use it again. I have the fullest intentions of not smoking again, even if I . . . got a job that didn't have drug testing, . . . I don't intend to jump back on the bandwagon just because I can." DOE Ex. 3 at 90. I am convinced that he did positively state that he would not use marijuana again, contrary to the allegation in the Notification Letter. Tr. at 33. Even though I believe that the LSO failed to raise a valid Criterion L security concern on this small point, I am not convinced by his direct statements that he will not use marijuana again. Accordingly, I will give no further consideration to the issue of his future intentions on further use.

because he admitted that he had met the Individual's wife only two times and did not social with the Individual. Accordingly, I am not convinced that she has stopped using marijuana as of the time of the hearing.

As to his cousin's usage, the Individual testified that in the future, he would ask his cousin if he had any marijuana in his possession and tell him to dispose of it. Given the overall weak testimony regarding marijuana use in this case, I do not afford the Individual's testimony on this point much weight. Based on the Individual's association with his wife and cousin, I find that he has not mitigated the Criterion L security concern.

V. Conclusion

As the foregoing indicates, the Individual has not resolved the Criteria F, K, and L security concerns cited in the Notification Letter. Therefore, I must conclude that the Individual has not shown that granting him access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should not be granted at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: November 9, 2009